STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DONALD CHEW,

Petitioner,

vs. Case No. 20-3798

SEVEN LAKES ASSOCIATION, INC.,

Respondent.
_____/

RECOMMENDED ORDER

On October 13, 2020, Hetal Desai, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted a final hearing via Zoom Web Conferencing.

APPEARANCES

For Petitioner: Donald Chew, pro se
1262 Northeast 41st Terrace Avenue
Cape Coral, Florida 33909

For Respondent: Christina Harris Schwinn, Esquire
Pavese Law Firm
1833 Hendry Street
Post Office Drawer 1507
Fort Myers, Florida 33901

STATEMENT OF THE ISSUES

Whether Respondent, Seven Lakes Association, Inc. (the Association), violated section 760.10, Florida Statutes (2018),[1] by discriminating against

[1] Unless otherwise indicated, all statutory and administrative rule references are to the 2018 codifications of the Florida Statutes and Florida Administrative Code.

Petitioner, Donald Chew, based on his race (African American) when it terminated his employment; and, if so, what is the appropriate remedy.

PRELIMINARY STATEMENT

On September 16, 2019, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) alleging discrimination based on "Race." Specifically, Petitioner, an African American male, alleged he had been treated differently than his white counterparts and was wrongfully terminated in violation of the Florida Civil Rights Act (FCRA).

On July 13, 2020, FCHR issued a "Determination: No Reasonable Cause," and Petitioner filed a timely Petition for Relief to contest that determination on August 13, 2020. The Petition for Relief again alleged Petitioner was wrongfully terminated due to his race and provided more specific instances of discriminatory treatment and racial comments. FCHR transmitted the Petition to DOAH, where it was assigned to the undersigned and noticed for a final hearing.

On October 8, 2020, the parties participated in a pre-hearing conference regarding the final hearing procedures and the presentation of evidence.

At the final hearing, Petitioner offered his own testimony and that of three other witnesses: Joan Farus (a white female and former co-worker at the Association); Timothy Day (a white male and the former General Manager of the Association); and Tanisha Davis (an African American female and Petitioner's wife). Additionally, Petitioner's Exhibits P-B through P-E, P-G through P-Q, and P-S were admitted in evidence. Respondent offered the testimony of four witnesses: Kathy Miske (a white female and Board member for the Association); Carl Triola (a white male and Board member for the Association); Linda Keyes (a white female and Board member for the

Association); and June Gibbs (a white female and Petitioner's former supervisor at the Association). Respondent's Exhibits R-A through R-S and R-U through R-Y were admitted into evidence.

The Transcript of the hearing was filed on October 26, 2020, and a corrected copy of the Transcript was filed on October 29, 2020. The parties both filed timely proposed recommended orders, which have been duly considered.

FINDINGS OF FACT

PARTIES

1. Petitioner, Donald Chew, is an African American male who was employed by the Association from January 23, 2017, to September 19, 2018. During the time he was there, Mr. Chew was one of the Association's few non-white employees.

2. Respondent, the Association, is a condominium association governed by chapter 718, Florida Statutes. According to Mr. Chew, a majority, if not all, of the condominium owners are white. The Association has approximately 50 employees.

3. The Association is governed by a Board of Directors (Board), made up of five to seven members. All the Board members who testified at the hearing were white. The Board hires a General Manager, who oversees the day-to-day operations of the Association. This includes oversight over the condominium grounds, recreation, and financial aspects of the Association. The General Manager had check-writing authority for the Association.

4. For the times relevant to Petitioner's claims, Timothy Day served as the General Manager.[2] Prior to being hired Mr. Day was involved in an investigation related to his employment with a local government entity.

[2] Mr. Chew was hired by the Association's General Manager Judy Grosvenor, but Mr. Day became General Manager in August 2017.

Neither the reason for the investigation nor the outcome of that investigation was clear from the evidence. Regardless, Mr. Day was given the opportunity to explain the circumstances related to the investigation to the Board prior to being hired.

5. Relevant to this case, the General Manager oversaw the Accounting Manager, who managed a staff of accountants. June Gibbs served as the Accounting Manager who oversaw Mr. Chew from the date of his hire to May 2018, while he was in the staff accountant role.

MR. CHEW'S JOB HISTORY AND DUTIES

6. The Association originally hired Mr. Chew for the position of staff accountant. The hiring process consisted of review of Mr. Chew's resume, an interview, and then a criminal background and reference check. The Association did not check Mr. Chew's litigation history at the time it hired him.

7. In September 2017, Ms. Gibbs gave Mr. Chew a mixed written performance review. Although he was "Above Average" in initiative and working relationships, Ms. Gibbs indicated he was "Below Average" in his basic accounting skills and his tardiness. In her comments, she noted:

> Don, I really dislike writing a negative evaluation. But, your accounting skills really concern me. This is why I hired you and the core of your position. It's been great that you have done well with the insurance and working with Brown & Brown. Even though we have struggled with the accounting parts of the insurance UMS you have done well assisting everyone setting [ ] this software up. And I believe you are above average in computer technology. But, once again accounting is the core.
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> At this point because I really need someone strong in accounting behind me. I am going to have you stay with what you are good at – working on the insurance and UMS. And I will appoint you some basic accounting jobs. Also work on any tardiness issues.

8. In March 2018, the Association requested that Mr. Chew obtain a Community Association Manager License (CAM License) from the Florida Department of Business and Professional Regulation. Mr. Chew submitted an online application in which he was required to answer a number of questions, including the following:

> 2. Are you or have you ever been a defendant in civil litigation in this or any other state … in which the basis of the complaint against you was alleged negligence, fraudulent or dishonest dealing, foreclosure, bankruptcy, or breach of fiduciary duty related to the practice or profession for which you are applying, or is there any such case or investigation pending.

9. Mr. Chew answered "No" to this question.

10. On May 2, 2018, the Association promoted Mr. Chew to the Administrative Services Manager (ASM) position, which reported directly to the General Manager, Timothy Day. Along with this promotion, Mr. Chew received a salary increase.

11. In the ASM position, Mr. Chew handled a variety of issues and considered himself the General Manager's "right hand man." Mr. Chew did very well in this position and was well liked by the Board, Mr. Day, and the Association staff.

12. In August 2018, Mr. Day announced that he would be resigning from the Association and recommended Mr. Chew for General Manager position.

13. On August 30, 2018, the Board voted unanimously to appoint Mr. Chew as the Interim General Manager.

14. The credible testimony at the hearing established that at this point the Board believed a final decision would be made for the permanent General Manager position after more extensive background checks were conducted on Mr. Chew. Meanwhile, Mr. Chew would serve in an interim capacity.

15. Later on August 30, Mr. Day informed Mr. Chew that he had received information that there was judgment for embezzlement against Mr. Chew in

an action brought by the Attorney General for the State of Illinois. Mr. Chew explained that the suit was not against him personally, but against a corporation.

16. On September 4, 2018, Mr. Day informed Mr. Chew that he was being placed on paid administrative leave pending an investigation into the Illinois litigation.

17. On September 19, 2018, the Association's attorney sent Mr. Chew a letter of termination.

DISCRIMINATORY ACTS

18. Mr. Chew testified that his accounting co-workers made racial comments that made him feel uncomfortable while he was working as a staff accountant. As described by Mr. Chew, these remarks were made while he was working under Ms. Gibbs, prior to May 2018. Mr. Chew's co-worker, Joan Farus, confirmed that Ms. Gibbs (Ms. Farus's and Mr. Chew's supervisor) and other employees talked about "black people" in a derogatory way around Mr. Chew.[3] The undersigned finds that Petitioner established that he was subject to discriminatory comments by staff prior to Mr. Chew becoming an ASM.

19. Mr. Chew also asserts that he was treated less favorably by the Board than the white employees. Mr. Chew presented little, if any, evidence of how he was treated less favorably by the Board. To the contrary, based on the testimony at the hearing by the Board members and staff, it was clear that Mr. Chew was well liked; the Board promoted him and provided him with bonuses and pay raises. The fact that the Board unanimously approved him for the Interim General Manager position on August 30, 2018, leads to the conclusion that the Board did not have any racial animus toward Mr. Chew.

20. Although the Association has an Equal Opportunity Employer and Non-Harassment Policy, there is nothing in its Employee Handbook

[3] Ms. Farus was terminated by the Association in August 2018.

specifically prohibiting discriminatory conduct based on race. The Handbook indicates employees "deserve to be treated with respect and courtesy." It also states it is company policy that the "workplace be free of tensions involving matters which do not relate to our business" such as "ethnic, religious, or sexual remarks," but stops short of explicitly prohibiting racism or racist comments.

21. The Handbook does urge an employee who feels harassed to notify a supervisor or the Human Resources department. It also provides that any grievances regarding the job, working conditions, or problems with another employee be submitted to the employee's immediate supervisor in writing.

22. There is no credible evidence Mr. Chew ever submitted a written complaint to his supervisor, Human Resources, or anyone else at the Association regarding the racist comments.

MR. CHEW'S BACKGROUND HISTORY

23. After the Board appointed Mr. Chew as the Interim General Manager, Kathy Miske, a white female who lived in an Association condominium, researched Mr. Chew's background.[4] Ms. Miske previously performed background checks for a law firm in Chicago before she moved to a condominium in the Association. She researched Mr. Chew because she had a "habit of checking on people," and she had been approached by a condominium resident, Debbie Combs, also a white female, who was suspicious of Mr. Chew. The reason for Ms. Combs's suspicion was not disclosed at the hearing.

24. Ms. Miske discovered that the Attorney General of Illinois had filed a "Verified Complaint for an Injunction, an Accounting, Surcharge, and Other Equitable Relief" (Complaint) against Mr. Chew personally in May 2013. The Complaint essentially described an embezzlement scheme, and specifically accused Mr. Chew of abusing a position of trust while employed at Marcy-

[4] Although she later became a Board member, at the time she researched Mr. Chew she was not.

Newbury Association, Inc. (MNA). It alleged Mr. Chew had misappropriated funds, in violation of the Illinois Charitable Trust Act. Although not a criminal prosecution, the Illinois Attorney General sought injunctive relief, civil damages, punitive damages, and civil penalties against Mr. Chew.

25. Ms. Miske also discovered an Order of Final Judgment (Final Judgment) had been entered against Mr. Chew in the Illinois case on September 9, 2013. The Final Judgement seems to be a default judgment. As a result, Mr. Chew was enjoined from serving as a charitable trustee, was ordered to pay $205,372 in damages, and was also required to pay interest and investigative costs.

26. Although Mr. Chew had a plausible explanation as to the circumstances surrounding the Illinois case, there was no evidence that the Final Judgment had been appealed, withdrawn, reversed, or nullified in any way.

27. Mr. Chew admitted he did not notify the Association of the Final Judgment and that he did not list MNA on the resume he provided to the Association.

28. Ms. Miske made copies of the Complaint and Final Judgment against Mr. Chew. She distributed the copies to three of the Board members that she knew personally. Eventually, copies were provided to the President of the Board, Mr. Day, and the Board's attorney.

29. The Association was required by law to maintain a bond to cover its employees, including the General Manager.[5] The Board members testified they were concerned that the Final Judgment would affect the Association's ability to obtain the proper bond if Mr. Chew became General Manager.

30. The Board members relied on the Association's attorney's advice regarding the Association's ability to obtain a bond and the attorney's recommendation to terminate Petitioner based on the Complaint and Final Judgment.

31. Mr. Chew claims that he was discriminated against because he was not given an opportunity to explain the Final Judgement or underlying facts to the Board. In comparison, he claims Mr. Day was given an opportunity to explain a criminal investigation against him and was hired despite the investigation. Mr. Day had previously been involved in the local government, but the nature of the investigation or the outcome of that investigation was not established at the hearing.

32. Mr. Chew had a Final Judgment against him by the Illinois Attorney General for what essentially amounted to embezzlement. In contrast, Mr. Day was only under investigation; there was no evidence he was found guilty of anything. Moreover, Mr. Chew failed to disclose a former employer, MNA. There is no proof that Mr. Day tried to hide that he had been under investigation or that he hid his employment by a previous employer.

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[5] Section 718.111(11)(h), Florida Statues, states:

> (11) INSURANCE.
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> * * *
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> (h) The association shall maintain insurance or fidelity bonding of all persons who control or disburse funds of the association. The insurance policy or fidelity bond must cover the maximum funds that will be in the custody of the association or its management agent at any one time. As used in this paragraph, the term "persons who control or disburse funds of the association" includes, but is not limited to, those individuals authorized to sign checks on behalf of the association, and the president, secretary, and treasurer of the association.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569, 120.57(1), and 760.11(7), Florida Statutes. *See* Fla. Admin. Code R. 60Y-4.016.

34. Pursuant to section 760.10(1)(a), it is an unlawful employment practice for an employer to "discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status."[6]

35. Mr. Chew relies on circumstantial evidence of discriminatory intent to prove his discrimination claim. Using the shifting burden of proof pattern established in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), first, Petitioner has the burden of proving a *prima facie* case of discrimination. Second, if Petitioner meet this initial burden, the burden shifts to Respondent to "articulate some legitimate, nondiscriminatory reason" for its action. Third, if Respondent satisfies this burden, Petitioner has the opportunity to prove that the legitimate reasons asserted by Respondent are really a pretext. *See Valenzuela*, 18 So. 3d at 22.

36. Every stage of this burden shifting analysis must be established by a preponderance of the evidence. *Id.*; *see also* § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure proceedings or except as otherwise provided by statute and shall be based exclusively on the evidence of record and on matters officially recognized.").

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[6] Florida courts have held that because the FCRA is patterned after Title VII of the Civil Rights Act of 1964, as amended, federal case law dealing with Title VII is applicable. *See, e.g., Valenzuela v. GlobeGround N. Am., LLC,* 18 So. 3d 17, 21-22 (Fla. 3d DCA 2009)(gender); *Thompson v. Baptist Hosp. of Miami, Inc.*, 279 F. App'x 884, 888 n.5 (11th Cir. 2008)(race).

TIME-BARRED ALLEGATIONS

37. In his hearing testimony and proposed recommended order, Petitioner alleges a panoply of wrongs by the Association against him because he is African American. As determined above, Mr. Chew has only proved that he was subject to racist remarks made by co-workers while he was a staff accountant.

38. The FCRA requires that a charge of discrimination be filed within 365 days of the alleged discrimination. § 760.11(1), Fla. Stat. "A claim is time barred if not filed within these time limits." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002); *Van Hoek v. McKesson Corp.,* 2020 WL 533940, at *4 (M.D. Fla. Feb. 3, 2020). In *Morgan*, the Supreme Court explained that discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. "Each discrete discriminatory act starts a new clock for filing charges alleging that act." *Morgan*, 536 U.S. at 113. Discrete acts are "easy to identify" and include termination, failure to promote, discipline, denial of transfer, or refusal to hire. *Id.* at 114. "The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed." *Id.* at 113.

39. Ultimately, Mr. Chew can only file charges to cover discrete acts that "occurred" within the appropriate time period. *Id.* Here, the racist comments made by staff occurred before he was promoted in May 2018. Petitioner filed his complaint with FCHR on September 16, 2019. Therefore, any discrimination that occurred prior to September 16, 2018, is time barred, and is untimely. As such, it is unnecessary to determine if these comments rise to the level of racial harassment so as to constitute a hostile work environment, or whether Petitioner was required to report them at the time they occurred.

DISPARATE TREATMENT

40. Mr. Chew points to the fact he was treated differently than Mr. Day, a white male, as evidence of discrimination. This "disparate treatment" claim is the most easily understood type of discrimination. *See Schultz v. Royal Caribbean Cruises, Ltd.*, 465 F.Supp.3d 1232, at 1261 (S.D. Fla. 2020). Disparate treatment occurs when an employer treats an employee less favorably than others because of his or her race, color, religion, sex, or national origin. *Id.* To establish a case of disparate treatment, Mr. Chew must demonstrate that he:

> (1) belonged to a protected class;
> (2) suffered an adverse employment action;
> (3) was qualified to do his job; and
> (4) was treated less favorably than similarly situated employees outside of the protected class.

See Alvarez v. Lakeland Area Mass Transit Dist., 2020 WL 3473286, at *10 (M.D. Fla. June 25, 2020).

41. There is no dispute as to the first element: Mr. Chew is African American. Regarding the second element, Mr. Chew suffered an adverse action when he was terminated and the Interim General Manager position was rescinded.

42. Petitioner has not provided sufficient evidence that he was qualified for the position of General Manager. First, the CMA License he received was based on false information. He failed to disclose that he had been a defendant in civil litigation alleging dishonest dealing. It is questionable whether Mr. Chew could have been qualified for the General Manager position without a CMA License. Second, there was sufficient evidence to show that the Final Judgment against Mr. Chew would risk the Association's ability to acquire the necessary bond. Therefore, the Association would not be able place him permanently in the General Manger position.

43. Even if he did meet the requirements to serve in the General Manager position, he cannot point to a similarly situated non-African American to meet the fourth "comparator" element of a disparate treatment claim. Petitioner must show he is similarly situated in all relevant respects to Mr. Day, the employee he claims the Board gave preferential treatment. *See Woods v. Cent. Fellowship Christian Acad.*, 545 F. App'x 939, 945 (11th Cir. 2013). More specifically, to be valid comparators for disparate discipline, such as termination, they must have "engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Sanguinetti v. United Parcel Serv., Inc.*, 114 F. Supp. 2d 1313, 1317 (S.D. Fla. 2000).

44. As recently explained in *Mac Papers, Inc. v. Boyd*, 2020 WL 6110622, at *2 (Fla. 1st DCA Oct. 16, 2020):

> Picking a single comparator with inadequate, irrelevant, or superficial similarities falls short of what the law requires. Courts require that comparators be meaningful, which explains why the Eleventh Circuit—which reviewed the oftentimes discordant caselaw on the topic—recently decided en banc that comparators must be "similarly situated in all material respects." *Lewis v. City of Union City, Georgia*, 918 F.3d 1213, 1218 (11th Cir. 2019) (rejecting "nearly-identical standard" as too rigid and rejecting "not useless" as too lax).
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> * * *
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> With *Lewis* and its progeny as our guideposts, Swift fails as a valid comparator. Consistent with *Lewis*, a "comparator's misconduct must be similar in all material respects." *McPhie v. Yeager*, 819 Fed.Appx. 696, 698–99 (11th Cir. 2020) (applying *Lewis*).

45. Here, as explained above, Mr. Day and Mr. Chew were not similar in all material aspects. Mr. Day was under investigation, whereas Mr. Chew

had a Final Judgment for embezzlement entered against him. As such, Mr. Chew has failed to prove the fourth element necessary to his disparate treatment claim: that a similarly-situated non-African American employee was treated better than he was treated.

ASSOCIATION'S REASON FOR TERMINATION

46. Regardless, even if Mr. Chew could meet his initial burden of establishing a *prima facie* race discrimination claim under *McDonnell Douglas*, the burden would shift to the Association to provide a legitimate non-discriminatory reason for Mr. Chew's termination and the rescission of the Interim General Manager position. The employer's burden, at this stage, is an "exceedingly light" one of production, not persuasion, which means the employer "need only produce evidence that could allow a rational fact finder to conclude that [the employee's] discharge was not made for a discriminatory reason." *Schultz*, 2020 WL 3035233, at *28.

47. The Association has met this burden. Given that it is required to carry a bond to cover its employees, and that bond was in jeopardy given the Final Judgment against Mr. Chew, any reasonable condominium association in the same position would have withdrawn consideration of Mr. Chew for the General Manager position. Further, the fact that he did not disclose his employment with MNA is sufficient to terminate him from any position.

PRETEXT

48. Having met its burden of producing a legitimate non-discriminatory reason for his termination, the burden would then shift back to Mr. Chew to establish this reason was a pretext. To show pretext, Petitioner must identify "weaknesses, inconsistencies, or contradictions in the Association's articulated legitimate reasons for its action so that a reasonable factfinder would find them unworthy of credence." *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1265 (11th Cir. 2010).

49. Mr. Chew could meet this burden by presenting evidence that employees outside his protected class were involved "in acts of comparable

seriousness [but] were nevertheless retained." *See McDonnell Douglas*, 411 U.S. at 804–05. Ultimately, he would need to show the Association's proffered reason for terminating him was a pretext because it (1) should not be believed, or (2) when considering all the evidence, it is more likely that the discriminatory reason motivated the decision than the employer's proffered reason. *See Bielawski v. Davis Roberts Boeller & Rife, P.A.*, 2020 WL 2838811, at *5, n.4 (M.D. Fla. June 1, 2020).

50. Again, Mr. Chew has failed to provide sufficient evidence for the undersigned to find that the proffered reason for his termination (the Illinois Complaint and Final Judgment against him and the impact on the Association's ability to be properly bonded) was a pretext.

51. Ultimately, Mr. Chew failed to prove he was terminated because of his race.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing Donald Chew's Petition for Relief.

DONE AND ENTERED this 18th day of November, 2020, in Tallahassee, Leon County, Florida.

HETAL DESAI
Administrative Law Judge
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Filed with the Clerk of the
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this 18th day of November, 2020.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.